ing, (R. 5-8, 291) and the Court below found that the Board had jurisdiction to do so (R. 1134). The Court below, however, also found (erroneously, as petitioner contends) that Jersey Central is a "public utility" as defined in the Federal Power Act, and held that the Federal Power Commission also had jurisdiction over the stock acquisition, despite the express provision in Section 201(a) of the Federal Power Act (49 Stat. 847, 16 U. S. C. A. Section 824) that Federal regulation shall "*extend only to those matters which are not subject to regulation by the States*".

Statutory Definition

The provisions of the Federal Power Act defining the term "public utility" are as follows (49 Stat. 847-8, 16 U. S. C. A. 824):

> "Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States*" (Italics added).
>
> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facili-*

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM—1942

No. 329

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,

against

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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August 21, 1942

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(a) The provisions and legislative history of the Act show clearly the intention of Congress that only a person who is directly engaged in the transmission of electric energy in interstate commerce is a "public utility" 19

(b) The transmission by a person of electric energy in interstate commerce occurs only when, in accordance with such person's intent, a through and continuous movement of such energy from State to State takes place 21

(c) Jersey Central did not intend that any energy generated by it in New Jersey be transmitted to New York, and no through and continuous interstate transmittal of energy by Jersey Central occurred 24

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ties used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. (Italics added.)

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

Connection of Jersey Central with Public Service

As stated previously, Jersey Central has no facilities for the *sale* of energy in interstate commerce. Jersey Central does have a connection with Public Service Electric and Gas Company (hereinafter referred to as "Public Service"), a non-affiliated company, at the south bank of the Raritan River, about seven-eighths of a mile from Jersey Central's generating plant at South Amboy, New Jersey. From time to time, under an informal, oral arrangement, subject to change daily or even hourly, Jersey Central sells to Public Service electric energy at the point of inter-connection in New Jersey (R. 277, 317-9), and Public Service takes the energy in its own lines under the Raritan River to the Mechanic Street substation of Public Service at Perth Amboy, New Jersey (R. 516). The Mechanic Street substation is one of fifty-four substations in the "Northern Zone" of Public Service (all of whose facilities are in New Jersey), and is one of seven substations in the "Central Division" of that Zone (R. 103, Comm. Ex. No. 10, R. 982). From this substation, Public Service has lines running to its Metuchen substation and switching station, to its Carteret

and Keasby substations, and thus to lines throughout its territory in New Jersey (R. 518). These lines constantly feed energy from Public Service's generators into Mechanic Street and draw from the latter as required by the demands of Public Service's customers. The Mechanic Street substation is an integral part of the general Public Service transmission and distribution circuits—one of the many points on the general service loops of that company, whose facilities and operations are much more extensive than those of Jersey Central or any of the other companies involved here.

The Public Service line interconnected with that of Jersey Central eventually leads to the bus bar of the Mechanic Street substation. That bus bar has nine other connections or "taps". Four of these run to the Public Service substations at Metuchen, Keasby and Carteret, referred to above, over all of which energy flows daily to and from the bus bar. Four other taps are connected with lines which serve local customers in and about Perth Amboy. One of the ten taps on this bus bar is connected to a line which runs through metering equipment, through an air-brake switch and then to a cable connected with the facilities of Staten Island Edison Corporation (hereinafter called "Staten Island"), a company selling electricity at retail in Staten Island, New York (R. 517-8).

It is beyond dispute that Jersey Central has no connections of any kind with Staten Island—no contracts, formal or informal, no arrangements, no "understandings", nothing (R. 285, 292-3, 332, 453-4). The court below expressly stated: "There were no commercial transactions whatsoever between the Staten Island Company and Jersey Central" (R. 1133). At certain infrequent and brief moments of time some energy (quantity unknown) generated by Jersey Central and delivered to the general circuits of Public Service escaped from the latter's lines to Staten Island. *The record is clear and uncontradicted that these escapes took place without the knowledge or intention of Jersey Central that such flow of energy should occur* (R. 285, 292-3). From an engineering standpoint, Jersey Cen-

tral could not route or direct energy to Staten Island even if it desired to do so, since control of the flow from Mechanic Street rests entirely in Public Service (R. 516). The court below, however, found that as a result of such occasional and irregular flow of energy from Public Service to Staten Island, the facilities of Jersey Central constituted facilities for the transmission of electric energy in interstate commerce, and that Jersey Central was therefore subject to the jurisdiction of the Commission.

Relation of Public Service and Staten Island

Public Service and Staten Island are in no way affiliated. The physical connection between the two companies is of long standing and antedates by several years the Jersey Central-Public Service connection (R. 273-4, 367). The engineer in charge of operations of Staten Island testified that the connection with Public Service is used primarily as an emergency connection (R. 349). At times when Public Service found itself able to generate especially cheaply it has also sold Staten Island "economy flow" energy under an informal, oral arrangement. As shown by the record (R. 355-60; Res. Ex. No. 3, R. 360, 1071), emergency and "economy flow" transactions between Staten Island and Public Service were quite insignificant in amount (R. 525).

Apart from the infrequent occasions when Staten Island took emergency or "economy flow" energy from Public Service, the two companies attempted to maintain the line "in balance", that is, to prevent *any* energy from flowing to either company. Uncontroverted testimony shows in detail that Staten Island has a watt-hour meter attached exclusively to the submarine cable connecting it with Public Service, so that the Staten Island operators may know at once when the balance has been disturbed and immediately restore it (R. 361-3, 409-11). It is impossible, of course, to maintain the balance absolutely, and there are surges or "swings" of energy, usually of momentary duration, from one company to another. As a result, unwanted energy "slops over" from one company to another (See R. 243,

245-61, 361, Resp. Ex. No. 8, R. 539, 1078½). This "slop-over" energy is of no commercial significance, and the record shows it is unreliable, unwanted and in general a nuisance (R. 361-3, 400, 465).

Petitioner concedes that during moments of time some energy generated by Jersey Central and transmitted to Public Service found its way over the lines of Public Service to Staten Island. However, the very examination made by the Commission to discover this phenomenon indicates that its occurrence was unknown and unintended by Jersey Central, beyond the control of Jersey Central, and of no *commercial* significance whatsoever. Public Service keeps a log record of energy flowing in and out of its Mechanic Street substation at given hours of the day, through the ten connections described above. The Commission examined the log readings during the period from January 26, 1937 to September 6, 1938, or a total of approximately 25,500 such readings (R. 266). From these the Commission selected 184, or 7/10ths of 1%—not at random, but deliberately and admittedly (R. 266) with the view of proving that some energy generated by Jersey Central found its way to Staten Island. To reach the conclusion desired, the Commission's engineers then made a detailed analysis of the energy supplied to and the demands made upon not only the Mechanic Street substation of Public Service, but all seven substations of the "Central Division" of Public Service (Comm. Ex. No. 13, R. 144, 1002). All these facilities are, of course, the property of Public Service, and Jersey Central has no information concerning their operation or any control over them. The Commission's engineers made studies of the power factors at each of the seven Public Service substations (R. 116), studied the line impedances throughout the Central Division of Public Service (R. 117), and finally concluded that on twenty-four of the 184 occasions (selected in turn from the 25,500), there were *moments of time* when all the energy flowing into Mechanic Street came from Jersey Central, and that since at those moments energy was flowing from Mechanic Street to Staten Island, that energy must have come from Jersey

Central (R. 125, Comm. Ex. No. 16-A). The record is clear that in every such instance during the period from August 26, 1935 (the date of the Federal Power Act's adoption) to March 14, 1938 (the date of the stock acquisition in question) energy generated by Jersey Central escaped to Staten Island from Public Service's lines solely and exclusively as "slopover" energy, while the two latter companies were attempting to keep their interconnection "in balance", to prevent *any flow* (Compare Comm. Ex. No. 16-A, R. 764, 1004 with Resp. Ex. Nos. 2 and 3, R. 353, 1079 and 360, 1071). On this evidence the Commission made its finding that Jersey Central owns facilities "utilized" for the transmission of energy in interstate commerce, and held Jersey Central to be a "public utility". This conclusion was affirmed by the Court below.

The status of one engaged *in* interstate commerce has thus been imposed on Jersey Central as a kind of vicarious liability, by reason of the acts or omissions of two other companies over whom Jersey Central has no control. Petitioner submits that this raises an important question of Federal law which the Court below decided erroneously, and which should be decided by this Court; that the position of the Commission and Court below appears directly contrary to *Oregon-Washington R. & Navigation Co.* vs. *Strauss & Co.*, 73 Fed. (2nd) 912, 914 (C. C. A. 9th, 1934), certiorari denied, 294 U. S. 723 (1935), where the Court, after examining many decisions of this Court and other Courts, said:

> "Under the decisions it is clear that two elements are indispensable to constitute an interstate or foreign shipment:
>
> '(1) There must be a through and continuous movement from one state to another, or to a foreign country.
>
> '(2) *There must be, at the time that the movement is started, an intention that the shipments shall be interstate or foreign, and this intention must be carried out. In a word, there must be the intent and the event . . .*"

Although the court below concluded that Jersey Central was a "public utility", it seemingly agreed with the contention of petitioner that Section 201(a) of the Act (49 Stat. 847, 16 U. S. C. A. Section 824(a)) limits the jurisdiction of the Federal Power Commission even over "public utilities" (such as petitioner), in view of the express language that Federal regulation shall "extend only to those matters which are not subject to regulation by the States", and the fact that the Board of Public Utility Commissioners of New Jersey approved the stock acquisition by petitioner. However, the court reasoned that no "conflict" between the State and Federal regulatory bodies was shown by the record, and the order of the Commission was therefore affirmed.

It is difficult to understand this conclusion. The New Jersey Board had jurisdiction over and approved the stock acquisition, so that the latter is a "matter" "subject to regulation by the States". The Act does not require that petitioner show that the Federal and State regulatory bodies disagree (if that is what is meant by "conflict"); either the Federal Power Commission had jurisdiction to pass on the stock acquisition or it did not. In holding that the Federal Power Commission had jurisdiction (for any purpose, or to any extent), petitioner respectfully submits that the court below was in error.

Questions Presented

I

Is Jersey Central a "public utility" as that term is defined in the Federal Power Act?

(a) Is a company, otherwise engaged wholly in intrastate commerce, engaged in interstate commerce by reason of the acts or omissions of other, non-affiliated persons, not its agents, over whom no control is exercised, and whose activities are conducted without its knowledge?

(b) Does the transmission of electric energy over facilities located wholly within a single state constitute transmission *in* interstate commerce without proof of a continuous movement of energy from one state to another, and without proof of any intention, express or implied, that the movement of energy shall be interstate?

(c) Does the transfer of energy by Jersey Central to Public Service constitute transmission *in* interstate commerce, in view of the delivery in the State of New Jersey of all such energy to the general network of Public Service, and the commingling of such energy with energy admittedly generated by Public Service?

II

Is the conclusion of the Court below that Jersey Central is a "public utility" tenable under Article I, Section 8, Clause 3 and the Tenth Amendment of the Constitution?

III

In view of the provision in Section 201(a) of the Federal Power Act, that Federal regulation shall not extend to matters subject to regulation by the States, has the Commission jurisdiction over Jersey Central, where it appears that all the facilities and all the activities of Jersey Central are subject to regulation by the Board of Public Utility Commissioners of New Jersey?

IV

In view of Section 201(a) of the Federal Power Act, and its legislative history, can the Commission exercise jurisdiction over petitioner or Jersey Central with respect to a "matter" which the court below found is subject to

regulation by the State of New Jersey, and which the appropriate regulatory body of the State of New Jersey has approved?

Reasons for Granting the Writ of Certiorari

I

This Court has never passed upon, or construed, the definition of "public utility" contained in the Federal Power Act. This case, therefore, raises an important question of Federal law which has not been, but should be, settled by this Court, to wit: whether the Federal Power Commission has jurisdiction over an electric company all of whose dealings are confined within the limits of a single State and which has no commercial transactions with any company or persons outside the State, but which may at times transmit electric energy, not destined for use outside the State, to the general circuits of another company (wholly within the State) which has a connection with a third company at the State border. The question is plainly one of public importance in view of the extent of utility facilities now in operation, the existence of State regulatory bodies in forty-seven States, and the express limitations on the scope of Federal regulation contained in the Federal Power Act itself.

The definition of "public utility" in the Act is not at all related to that term as used at Common Law, but on the contrary is a purely statutory concept and requires the analysis and interpretation of five separate subparagraphs in Section 201 of the Act. The record in the present case is free of such possibly extraneous issues as subterfuge, fraud, evasion or affiliation, and affords a good opportunity to construe a basic provision of a statute which has proven difficult and perplexing to follow or apply.

II

The court below, in holding that Jersey Central was engaged in interstate commerce by reason of the acts of other, non-affiliated persons over whom it has no control, and who act without its knowledge or direction, has decided an important question of Federal law in a manner which is untenable and not in accord with the Federal Power Act itself or with the following decisions, among others, of this Court and of various Circuit Courts of Appeal.

Superior Oil Co. v. *Mississippi*, 280 U. S. 389 (1930);
Atlantic Coast Line R. Co. v. *Standard Oil Co.*, 275 U. S. 257 (1927);
Moore v. *New York Cotton Exchange*, 270 U. S. 593 (1926);
Louisville & Nashville R. Co. v. *Parker*, 242 U. S. 13 (1916);
Federal Trade Commission v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941);
Department of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62, 68 (1941);
Oregon-Washington R. & Navigation Co. v. *Strauss & Co.*, 73 Fed. (2nd) 912, 914 (C. C. A. 9th, 1934, certiorari denied, 294 U. S. 723 (1935));
Lipson v. *Spcony Vacuum Corporation*, 87 Fed. (2nd) 265, 267 (C. C. A. 1st, 1937);
Jewel Tea Co. v. *Williams*, 118 Fed. (2nd) 202 (C. C. A. 10th, 1941).

III

This Court has never passed upon or construed Section 201(a) of the Federal Power Act. In construing that provision the Court below has decided important questions of Federal law which have not been, but should be settled by this Court.

The Federal Power Act differs from many recent Federal regulatory enactments in that: (a) Federal regula-

tion is directed only to persons engaged *in* certain types of interstate commerce, and not to persons in activities which may merely *affect* interstate commerce; and (b) Federal regulation over persons admittedly engaged in the specified types of interstate commerce is limited to "those matters which are not subject to regulation by the States". This provision is one of the most important in the entire Act, since it marks the jurisdictional boundary between the forty-seven State commissions and the Federal Power Commission. Section 201(a) was the result of extensive Congressional debate and amendment, as appears from the legislative history referred to in the opinion of the court below (R. 1128-1131). The instant case affords a good opportunity for this Court to render an authoritative construction of Section 201(a), since the court below expressly found that petitioner's acquisition of stock in Jersey Central was subject to regulation by the State of New Jersey and approved by the appropriate regulatory body of that State, but nevertheless held such acquisition was also subject to the jurisdiction of the Federal Power Commission.

IV

In so far as the decision of the court below holds that Federal regulation under the Commerce Clause may be imposed on an electric company as long as it can be shown that any quantity of energy, no matter how small, generated by it reaches a second state, regardless of the infrequency or irregularity of such occurrence, regardless of the commingling of such energy with that of non-affiliated companies, and regardless of the absence of any commercial relationship with any person or company in another state and of the absence of any intent to engage in interstate commerce, such decision is not tenable under Article I, Section 8, Clause 3 or the Tenth Amendment of the Constitution, and

is not in accord with the following decisions, among others, of this Court:

Utah Power & Light Company v. *Pfost*, 286 U. S. 165 (1932);
McCluskey v. *Marysville & N. R. Co.*, 243 U. S. 36, 39 (1917);
Swift and Co. v. *United States*, 196 U. S. 375, 398 (1905);
Galveston, Harrisburg & San Antonio Ry. Co. v. *Texas*, 210 U. S. 217, 225 (1908);
National Labor Relations Board v. *Fainblatt*, 300 U. S. 601, 607 (1939);
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453, 466 (1938).

CONCLUSION

WHEREFORE, petitioner, New Jersey Power & Light Company, prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of proceedings of said Circuit Court of Appeals for the Third Circuit in this case, numbered and entitled on its docket as No. 7257, *New Jersey Power & Light Company* vs. *Federal Power Commission*, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals for the Third Circuit herein be reversed by this Court; and for such other relief as to this Court may seem proper.

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FREDERIC P. GLICK
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Reference to Opinions Below

The opinion of the Federal Power Commission is reported unofficially at 30 P. U. R. (N. S.) 33, and appears at R. 936-940. The opinion of the Circuit Court of Appeals for the Third Circuit is not yet officially reported, but appears at R. 1113-1134, and is reprinted as Appendix A hereto.

Statement of Jurisdiction

The Federal Power Commission, by order entered July 18, 1939 (R. 936) found that petitioner violated Section 203(a) of the Federal Power Act (49 Stat. 849, 16 U. S. C. A. Sec. 824b), by reason of the acquisition by petitioner of 341,350 shares of Common Stock of Jersey Central. The United States Circuit Court of Appeals for the Third Circuit affirmed this determination (R. 1135). The petition for certiorari herein is filed in accordance with the provisions of Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A. Sec. 825 *l*) and Section 240 of the Judicial Code, as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A. Sec. 347). The judgment of the Circuit Court of Appeals was entered May 25, 1942, and the petition herein was filed in this Court within three months thereafter.

Statement of the Case

The nature of the proceedings below and a summary statement of the facts therein are contained in the petition for certiorari (pp. 1-11). Reference is also made to the facts as set forth by the Court below (R. 1114-1121).

Specification of Errors

1. The Court below erred in holding that Jersey Central is a "public utility" as defined in the Federal Power Act.

2. The conclusion of the Court below that Jersey Central owns facilities for the transmission of electric energy in interstate commerce is in error in that such conclusion is not consonant with Article I, Section 8, Clause 3 and the Tenth Amendment of the Constitution.

3. The Court below erred in construing Section 201(a) of the Federal Power Act to mean that the Federal Power Commission had jurisdiction to pass on petitioner's acquisition of Jersey Central's common stock, in view of the prior approval of such acquisition by the Board of Public Utility Commissioners of New Jersey.

SUMMARY OF ARGUMENT

POINT I

Jersey Central is not a "public utility", as defined in the Federal Power Act, and the holding to the contrary by the Court below is untenable, represents a construction of the Act not consonant with the Commerce Clause of the Constitution, and raises important questions of Federal law which should be decided by this Court.

POINT II

Under the provisions of Section 201(a) of the Federal Power Act the Commission had no jurisdiction to pass on petitioner's acquisition of Jersey Central's Common Stock, and the holding to the contrary by the Court below is in error and raises an important question of Federal law which should be, but has not been, decided by this Court.

ARGUMENT

POINT I

Jersey Central is not a "public utility", as defined in the Federal Power Act, and the holding to the contrary by the Court below is untenable, represents a construction of the Act not consonant with the Commerce Clause of the Constitution, and raises important questions of Federal law which should be decided by this Court.

(a) The provisions and legislative history of the Act show clearly the intention of Congress that only a person who is directly engaged in the transmission of electric energy in interstate commerce is a "public utility"

The definition of "public utility" in the Federal Power Act is peculiar in that Section 201(e) (49 Stat. 848, 16 U. S. C. A. Sec. 824), while purporting to define the term, provides merely that a "public utility" is any person who owns or operates facilities subject to the jurisdiction of the Commission. Hence Sections 201(a) and 201(b), which purport to describe facilities subject to the Commission's jurisdiction, are immediately relevant (49 Stat. 847, 16 U. S. C. A. Sec. 824).

In substance, these sections (which have been reprinted at pp. 5-6, *supra*) provide *positively* and *negatively* that the Commission's jurisdiction is to extend only to the transmission of electric energy and the sale of electric energy at wholesale *in* interstate commerce, and not to the generation of electricity, or to facilities used in local distribution or to the transmission of electric energy in *intrastate* commerce. Finally, Federal regulation is restricted *"only to those matters which are not subject to regulation by the States"*. From the terms of the statute itself, therefore, the jurisdiction of the Commission is definitely limited, and as a corollary the term "public utility" includes only a restricted type of electric utility company.

The limited application of the term "public utility" becomes even more apparent when the legislative history

of the Act is examined. The Federal Power Act was a companion bill to the Public Utility Holding Company Act of 1935, and both were introduced in the Senate as S. 1725, 74th Congress, 1st Session, and in the House as H.R. 5423, 74th Congress, 1st Session. Since it was believed that State commissions could not effectively regulate *holding* companies, owning stocks of subsidiary companies in many states, Congress determined to regulate all such companies "which are engaged in interstate commerce or in activities which directly *affect* or *burden* interstate commerce" (49 Stat. 803, Sec. 1, 15 U. S. C. A. Sec. 79a). On the other hand, *operating* companies engaged in the electric utility business had been subject to regulation for many years by State commissions, which now exist in forty-seven States. Here the stated need for Federal regulation was that disclosed by *Public Utilities Commission* vs. *Attleboro Steam and Electric Company*, 273 U. S. 83 (1927), which held that the state where electricity is generated is without constitutional power to regulate sales at wholesale or transmission directly across a state line.

To close this "gap" in utility regulation, the Federal Power Act was adopted. That this was the purpose of the Act is evidenced throughout the course of the Act's legislative history. For example, Chairman Rayburn, of the House Committee, made this explicit statement in reporting on the bill (H. R. Rep. No. 1318, 74th Cong., 1st Sess.):

> "Under the decision of the Supreme Court of the United States in *Public Utilities Commission* vs. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. *Part II gives the Federal Power Commission jurisdiction to regulate these rates.* . . ." (p. 7)
>
> "The bill takes no authority from State commissions . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . . *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill*" (p. 8).

In the interest of brevity, petitioner will do little more than refer to the portion of the opinion of the Court below dealing with the legislative history of the Act (See R. 1128-1131). It is significant, however, that the original bill was far broader in scope than the Act as finally adopted. Among other things, the original bill (S. 1725, 74th Cong., 1st Sess.) imposed Federal regulation over generating facilities and facilities "*connected with*" facilities for the transmission and sale of electric energy in interstate commerce. Furthermore, there was no such provision as that contained in present Section 201(a) restricting Federal regulation to those matters not subject to regulation by the States.

The changes in the original bill were made after protest by the States themselves, through the National Association of Railroad and Utilities Commissioners, which was otherwise in favor of Federal legislation to regulate the "gap" previously referred to. See Hearings, House Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session, H. R. 5423, p. 1610 ff., p. 1638, p. 1660 ff., p. 1677. The Act as finally passed was thus clearly limited to its original purpose—to fill the gap in State regulation disclosed by *Public Utilities Commission* vs. *Attleboro Steam and Electric Company*, 273 U. S. 83 (1927). Only those companies actually engaged in selling or transmitting energy in interstate commerce, which was beyond the power of the States to regulate, were included as "public utilities" subject to the Act. Companies merely "*connected with*" other facilities for interstate transmission and sale were eliminated from the definition of "public utility".

(b) The transmission by a person of electric energy in interstate commerce occurs only when, in accordance with such person's intent, a through and continuous movement of such energy from State to State takes place

Since it is clear that under the Act itself a company becomes a "public utility" only when it is engaged strictly in interstate commerce, and not merely by reason of acts which may affect or burden or lead to or are connected with interstate commerce, decisions dealing with what is neces-

sary to constitute an interstate shipment of a commodity are immediately relevant, especially since the Court below did not find that Jersey Central *sold* any energy in interstate commerce, but held merely that it was engaged in transmitting (i. e., transporting or shipping) electric energy in interstate commerce.

The law is clear that the movement of a commodity within one state constitutes interstate commerce only when it appears that there was (a) a through and continuous movement of the commodity from one state to another; and (b) an intention on the part of the first shipper, at the time of shipment, that the article move in interstate commerce.

To the effect that Federal regulation under the commerce clause requires through and continuous transit, see *McCluskey* vs. *Marysville & N. Ry. Co.*, 244 U. S. 36 (1917); *Arkadelphia Milling Company* vs. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 149 (1919); and *Baltimore & Ohio R. Co.* v. *United States*, 15 F. Supp. 674 (1936) (per Learned Hand, J.).

An intention on the part of the shipper, *at the time the particular shipment starts its journey*, that the commodity move in interstate commerce is equally essential. Obviously, if a finding of interstate commerce could be based on the mere *fact* that goods sold or shipped by one person eventually are found in a second state, regardless of such person's knowledge or intention, or the intervention of one or more other persons, hardly any business activity would remain outside the scope of the Commerce Clause. Thus in *Superior Oil Company* vs. *Mississippi*, 280 U. S. 390 (1930), Mr. Justice Holmes pointed out that shipments are not interstate merely because made with "indifferent knowledge" that the buyer contemplates carrying a commodity to a second state, even though in *fact* the shipments customarily reached another state. The same thought is expressed in *Louisville & Nashville Railroad Company* vs. *Parker*, 242 U. S. 13 (1916) (the "mere expectation" that an interstate movement will occur is not enough); and in

Moore vs. *New York Cotton Exchange*, 270 U. S. 593 (1926), where the court said:

> "'If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which can not have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware and Leland Co. *v.* Mobile County, 209 U. S. 405, 412, 413, 28 S. Ct. 526; 52 L. Ed. 855, 14 Ann. Cas. 1031. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough.'"

To the same effect, see *Atlantic Coast Line R. Co. vs. Standard Oil Co. of Kentucky*, 275 U. S. 257 (1927); *Jewel Tea Company* vs. *Williams*, 118 Fed. (2nd) 202 (1941); and *Lipson* vs. *Socony Vacuum Corporation*, 87 Fed. (2nd) 265 (1937).

The cases are well summarized and illustrated in *Oregon-Washington R. & Navigation Co.* vs. *Strauss & Co.*, 73 Fed. (2nd) 912 (1934), certiorari denied, 294 U. S. 723 (1935). That case is particularly relevant since it, too, involves the question of how far Federal regulatory power extends over the shipment of a commodity within a single state, as against the like power of the state itself. In that case a grain company in Oregon was in the business of purchasing Oregon wheat which was then consigned and shipped to it at Portland. The facts disclosed that customarily about 90% of this grain was resold (some directly from cars on the tracks) and shipped to persons outside Oregon, via other railroads or by sea. The plaintiff railroad carried the grain in Oregon, to Portland, and demanded compensation on the basis of an interstate tariff, filed with the Interstate Commerce Commission. The defendant insisted that the lower, intrastate rate (approved by the State Commission) applied to such carriage. The court held for defendant, on the ground that the shipper failed to allege and prove that each shipment of grain, *at*

the time it started to move in Oregon, was intended for interstate commerce. The court summarized the rule of the relevant decisions as follows:

> "Under the decisions it is clear that two elements are indispensable to constitute an interstate or foreign shipment:
>
> "(1) There must be a through and continuous movement from one state to another, or to a foreign country.
>
> "(2) There must be, at the time that the movement is started, an intention that the shipments shall be interstate or foreign, and this intention must be carried out. In a word, there must be the intent and the event . . . "

The court went further and stated (p. 915) that in order to recover, the carrier would have to make and prove the following allegation:

> "Prior to the time that each shipment mentioned in this complaint left the interior point of origin, the defendant intended that such shipment would be transported into another state or to a foreign country; and such shipment was in fact so transported."

The court then pointed out that the railroad had refused to amend its complaint for the reason that under the facts stated above it could not make such allegation.

(c) Jersey Central did not intend that any energy generated by it in New Jersey be transmitted to New York, and no through and continuous interstate transmission of energy by Jersey Central occurred.

It is appropriate, therefore, to see in the present case whether the Federal Power Commission could have made and sustained such an allegation with respect to the activities of Jersey Central. Petitioner will not repeat the facts stated in the petition (pp. 1-11), but points again to the testimony (R. 285, 292-3) of Mr. Crumley, who directs

the operations of Jersey Central, that when Jersey Central delivered energy to Public Service the former had no knowledge what Public Service did with such energy, and there were no arrangements whatsoever that such energy was for Staten Island or for anyone else other than Public Service itself; that Jersey Central had no arrangements or understandings of any kind with or with respect to Staten Island. In the same way, Mr. Lytle, who directs the operations of Staten Island, likewise testified (R. 365) that Staten Island's transactions with Public Service were in no way related to Jersey Central; that Staten Island always understood it received energy from Public Service; that "All our negotiations, all our agreements, all our talks with them, . . . led us to believe that it was power generated by Public Service Electric & Gas Company" (R. 363).

The Court below did not state directly, and made no finding, that Jersey Central intends to ship or transmit electric energy in interstate commerce to Staten Island. Moreover, the Court stated that "no one can say" how much energy went from Jersey Central to Staten Island, and that "Measured in terms of the KWH generated and transmitted by large electric public utility systems it was small" (R. 1121). Again, the lack of any commercial relations between the two companies was conceded (R. 1133).

Accordingly, petitioner submits there is neither substantial evidence nor any evidence of an intention on the part of Jersey Central that energy delivered by it to Public Service should move in interstate commerce or be used by anyone other than Public Service.

There is equally lacking any through and continuous movement in interstate commerce. The Court below held that since in the twenty-four instances already alluded to (p. 9) energy from Jersey Central flowed to Staten Island, such flow was direct and "not unexpected". Petitioner respectfully submits that this reasoning overlooks the fact that the concurrence of circumstances—the input and out-

put of energy throughout the Central Division of Public Service, the power factor at the time, the line impedances, the swing of "slop-over" at the moment between Public Service and Staten Island—necessary to permit energy to flow from Jersey Central to Staten Island, is unusual and in the highest degree accidental, and, as this record shows, occurred with such infrequency and irregularity that there was not in any sense a continuous flow of energy between Jersey Central and Staten Island.

Nevertheless, the Court below held that Jersey Central was engaged in interstate commerce. The reasoning of the Court was as follows:

> "Some part of the electricity passing from the Jersey Central system to the Public Service system moved in interstate commerce and reached the Staten Island Company. That electric energy was transmitted in interstate commerce within the meaning of Section 201(c) if the words of the subsection be applied literally. The facilities of Jersey Central were in fact employed for this transmission. This was not an accident. Once the circuit between the Jersey Central generating plant and the Staten Island Company [fol. 1142] was closed, inevitably electricity flowed from Jersey Central to the Staten Island Company. That result was not only not unexpected, it was unavoidable. The fact that Jersey Central sold this electricity to Public Service rather than to Staten Island does not serve to put the flow out of commerce. Once electricity flowed from the Jersey Central generating plant to the Staten Island Company, commercial transactions between the three companies under their respective contractual relations and arrangements followed. This was interstate commerce within the meaning of the Commerce Clause."

Section 201(c) of the Act provides that "For purposes of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof". It is a *physical fact* that Jersey Central transmits energy only within New Jersey, and does not transmit energy *from* any state. It is

significant that the court, in the extract quoted above, states that Jersey Central sells the electricity to *Public Service*.

(d) The construction given by the Court below to the Federal Power Act is not consonant with Article I, Section 8, Clause 3 of the Constitution.

The decision of the Court below appears to be based on what it itself termed a "literal" construction of Section 201(c), to the effect that as long as energy generated in one state can in fact be traced to a second state, *any* facilities over which such energy flows are facilities used for interstate commerce and subject to the jurisdiction of the Commission. If the Act is thus construed, it is petitioner's contention that the Act, and particularly Section 201(c), would be unconstitutional as going beyond the power of Congress under the Commerce Clause.* Even with respect to the power of Congress to regulate activities which "affect" or "burden" interstate commerce, it has always been held that the effect on interstate commerce must be direct and substantial. In *Santa Cruz Fruit Packing Company* vs. *National Labor Relations Board*, 303 U. S. 453 (1938), this Court said (at page 466):

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States."

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* Section 201(c) is actually a *limiting* provision, in that it excludes from Commission jurisdiction facilities for interstate transmission if the energy transmitted outside the state of generation is not also consumed outside the state. The section has been so applied by the Commission itself in *Matter of Chicago District Electric Generating Company*, F. P. C. Opinion No. 63, July 16, 1941.

Not every activity constitutes commerce or interstate commerce; this Court has many times said that interstate commerce is not a technical legal conception, but a practical one fixed by practical lines and the established course of business. See *Swift & Co.* vs. *United States*, 196 U. S. 375, 398 (1905) and *Galveston, Harrisburg & San Antonio Railway Company* vs. *Texas*, 210 U. S. 217, 225 (1908), and *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10 (1928). That interstate commerce with respect to electricity is likewise governed by practical considerations was held by this Court in *Utah Power & Light Company* vs. *Pfost*, 286 U. S. 165 (1932). In that case the State of Utah imposed a tax on the generation of electricity, and a company owning and operating a hydro-electric development in the state sought to escape the tax by arguing that electricity generated by it in Utah was transmitted directly to another state; that the flow of energy from the generator to the point of consumption in another state was instantaneous, as a matter of scientific fact, and there was no local or intrastate activity for Utah to tax. This argument is strikingly parallel to that made by the Commission and the Court below, which rested its decision on the fact that once the requisite combination of circumstances existed, energy flowed with the speed of light from Jersey Central to Staten Island, and that the interposition of Public Service was without significance. However, the *Utah Power & Light Company* case held that "what constitutes commerce, manufacturing or production is to be determined upon practical considerations", and that from a practical business standpoint electricity should be treated as a commodity, and commercial transfers and shipments of electricity should have the same legal significance as would follow the transfer and shipment of other commodities. Accordingly, this Court held there was a business or functional break at the point energy was transferred from generator to transmission line, and operations up to the point of transfer were local and subject to state taxation.

In the present case, while petitioner concedes that the Commission was able to demonstrate as a scientific fact that on infrequent and irregular occasions electric energy generated by Jersey Central reached Staten Island, petitioner urges that this does not and cannot of itself constitute interstate commerce. That any such movements of energy were not *business* transactions is perhaps best shown by the statement of the Court below that "There were no commercial transactions whatsoever between the Staten Island Company and Jersey Central" (R. 1133). This, of course, followed from the uncontroverted testimony, already referred to, of the operators of both companies.

It is evident that there were no commercial relations, and therefore there was no commerce, between Jersey Central and Staten Island. In fact, the quantity and character of any flow of energy between the two companies indicates that the maxim *de minimis non curat lex* should apply, in accordance with the principle stated in *National Labor Relations Board* vs. *Fainblatt*, 300 U. S. 601, 607 (1939) and adopted by several lower courts since its announcement. See *Goldberg* vs. *Worman*, 37 F. Supp. 778 (1941); *Rauhoff* vs. *Henry Gramling & Company*, 42 F. Supp. 754 (1941); *Collins* vs. *Kidd*, 38 F. Supp. 634 (1941).

* * *

The decision of the Court not only constitutes an untenable construction of the Federal Power Act but insofar as the Court held that the status of a company under the Act can depend on the acts of other, non-affiliated companies over whom it has no control, corporate-wise or physical, its decision represents a construction of the Act not consonant with the Commerce Clause, and raises novel and important questions of Federal law which should be decided by this Court.

POINT II

Under the provisions of Section 201(a) of the Federal Power Act the Commission had no jurisdiction to pass on petitioner's acquisition of Jersey Central's Common Stock, and the holding to the contrary by the Court below is in error and raises an important question of Federal law which should be, but has not been, decided by this Court.

The Court below, after considering the language of Section 201 of the Act and its legislative history, agreed with petitioner that "by Section 201(a) Congress made it plain that such [Federal] regulation was to extend only to those matters which were not subject to regulation by the States." (R. 1134). The Court also noted that "the transfer of stock with which we are concerned was approved by the Board of Public Utility Commissioners of New Jersey in the exercise of authority granted to the Commissioners by the law of New Jersey" (R. 1134). At this point it would seem that the only conclusion possible was: Federal regulation does not extend to the stock acquisition.

Instead, the order of the Commission was affirmed, i. e., petitioner was held to have violated Section 203(a) of the Act in acquiring the stock without authorization by the Commission. But if Federal regulation does not extend to such a matter as the stock acquisition, how could petitioner possibly have violated the Act in not securing authorization from a Federal agency?

The only answer made by the Court below is the following:

> "The sale was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of Section 201(e). We must consider the point of dual control but only insofar as it may be applicable to the appeals at bar, in view of the provisions of Section 201(a) restricting federal regulation, and the legislative history of Part II of the Act. The authority of the Board of Public Utility Commissioners of New

> Jersey must be deemed to be paramount in those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the transmission of electric energy in interstate commerce. We cannot presume a conflict between the two regulatory bodies upon the issue of whether or not Jersey Power should have bought the stock of Jersey Central. No conflict is shown upon the present record and none may ever come into existence" (R. 1134).

Petitioner respectfully submits that this answer is fallacious. First, it misses the point that Section 201(a) not only limits the type of physical facilities subject to the Commission's jurisdiction, but also the jurisdiction to be exercised over *admitted public utilities*, such as petitioner. It is quite customary to find that Congress, in creating a Federal agency to regulate interstate commerce, conferred only incomplete powers on such agency, and left the residuary powers to the States. This feature of our Federal form of government was recently fully explored and discussed by Mr. Justice Frankfurter in *Kirschbaum* vs. *Walling*, 62 Sup. Ct. 1116 (June 1, 1942) and in *Federal Trade Commission* vs. *Bunte Bros., Inc.*, 312 U. S. 349 (1941). See also *Safe Harbor Water Corporation* vs. *Federal Power Commission*, 124 Fed. (2nd) 800 (1941), certiorari denied, 62 Sup. Ct. 943 (1942). In addition, there is nothing in the Act which requires petitioner to show a conflict between the State and Federal regulatory bodies. Even if there were such a requirement, the existence of such a conflict with respect to the particular transaction in question is abundantly clear. However, the purpose of Section 201(a) is to *avoid* such conflict. The Court reasons that if petitioner had shown "a conflict between the two regulatory bodies upon the issue whether or not Jersey Power [petitioner] should have bought the stock of Jersey Central", this showing would have ousted the Federal Power Commission of jurisdiction. Did the Court below intend that the jurisdiction of the Commission would exist only insofar as the Commission agreed with the State body?

The following extract from the debate on the floor of the Senate shows how thoroughly it was understood by Congress that the Federal Power Commission was not to regulate intrastate commerce, and that the jurisdiction of the State commissions was not to be disturbed:

> "Mr. Borah: I understand that it is not the intention of the framers and proponents of the measure to deal with intrastate matters at all.
>
> "Mr. Wheeler: That is correct.
>
> "Mr. Borah: If the general language used could be construed as dealing with intrastate matters, nevertheless the intention is to confine the operation of the bill to interstate matters?
>
> "Mr. Wheeler: That is entirely correct." (Cong. Record, Vol. 79, Part 8, p. 8431).
>
> "Mr. Wheeler: * * * We preserve the state regulation completely in the bill, but in title II we made the positive statement that the policy should not be to interfere with state regulation, but to assist and help state regulation." (Cong. Record, Vol. 79, Part 8, p. 8775).

If the Federal Power Commission has jurisdiction over the stock acquisition its refusal to approve such acquisition, despite the prior approval by the State body, would obviously constitute direct "interference" with State regulation. This was precisely the situation which Congress envisaged and sought to avoid when it discarded the original draft of the Act and inserted Section 201(a). Such action by Congress amply illustrates the "accommodation as between assertions of new federal authority and historic functions of the individual States" (*Kirschbaum* v. *Walling*, 62 Sup. Ct. 1116, 1118, June 1, 1942).

As showing that the questions raised by the decision of the Court below are of national interest and should be decided by this Court, petitioner has attached hereto as Appendix B a copy of Bulletin No. 102—1942, dated June 6, 1942, issued by the National Association of Railroad and Utilities Commissioners. This Bulletin comments upon the decision of the court below and is, in petitioner's opin-

ion, highly significant since the National Association of Railroad and Utilities Commissioners, as the representative of all State commissions, was instrumental in persuading Congress in 1935 both to regulate the sale and transmission of electricity in interstate commerce, and to adopt the Act in its present form (See p. 21, *supra*). In 1935, as at present, Mr. John E. Benton, over whose signature this Bulletin was issued, was General Counsel to the Association, and presented the amendments sponsored by the Association (*id.*).

The Bulletin describes the decision of the Court below as "somewhat startling", and remarks that "if sustained, it would seem to show that any *intrastate* electric utility which transmits *any* power to any electric utility runs the risk of being transferred into an *interstate utility* subject to the Federal Power Act by *transactions over which it has no control.*"

The author of the Bulletin has the same difficulty as petitioner in reconciling the Court's decision with the language of Section 201(a). The Bulletin states:

> "*Plainly*, as the court in its opinion says, *the stock sale transaction was subject to State commission regulation.* If within the reach of Federal power to regulate, Congress chose to direct that the Act should be so construed as to avoid interference with the exercise of State power. In this case, however, the court appears to have held that the stock sale transaction is *subject to regulation both by the New Jersey Commission and by the Federal Power Commission.* How each such commission can exercise 'paramount' or 'governing' authority over the same transaction, it is difficult to understand. The fact that conflict between the two commissions has not yet arisen does not answer the question. If the construction placed upon the Act by the court brings the Jersey Central under the jurisdiction of the Federal Power Commission, as to that transaction, *either that Commission has power to override the decision of the New Jersey Commission, or its decision is not 'governing'.*"

Petitioner respectfully submits that the petition herein should be granted not only because the decision of the Court below is untenable, but because a decision by this Court is necessary in the proper administration of the Federal Power Act.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Court below reversed and set aside.

Respectfully submitted,

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FREDERIC P. GLICK,
Of Counsel.

Appendix A

Opinion of the Court Below

(the pagination is the same as in the certified transcript of the record)

[fol. 1119] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1939

No. 7256

Jersey Central Power & Light Company, Petitioner,

v.

Federal Power Commission, Respondent

No. 7257

New Jersey Power & Light Company, Petitioner,

v.

Federal Power Commission, Respondent

On Petitions for Review from an Order of the Federal Power Commission

Opinion—Filed May 25, 1942

Before Biggs, Maris and Goodrich, Circuit Judges

Biggs, *Circuit Judge:*

[fol. 1120] Questions Involved

The petitioners in the cases at bar, Jersey Central Power and Light Company and New Jersey Power and Light Company, seek review of an order of the Federal Power Commission entered July 18, 1939 pursuant to the Federal Power Act (16 U. S. C. A. Sec. 791 et seq.). The first question presented for our determination is whether this court has jurisdiction of the petitions by virtue of Section 313(b) of the Federal Power Act (16 U. S. C. A. Sec. 825 1(b)). The second question is whether the "Determina-

tion of the Commission" can be sustained on its merits. The facts are as follows:

Facts

On June 7, 1938 the Commission entered an order pursuant to the provisions of Section 301(b), Part III of the Federal Power Act (16 U. S. C. A. Sec. 825 (b)), directing the petitioner, Jersey Power, to submit information concerning the acquisition by it of 341,350 shares of the common stock of the petitioner, Jersey Central, without the authorization of the Commission and allegedly in violation of Section 203(a) of the Act (16 U. S. C. A. Sec. 824b(a)). This section provides that no public utility within the purview of the Act shall purchase or acquire any security of any other public utility within the purview of the Act without having first secured an order of the Commission authorizing it to do so. Jersey Power, admitting that it was a public utility within the meaning of Section 201(e) of the Act (16 U. S. C. A. 824 (e)), filed an answer to the Commission's order admitting that it had acquired the stock of Jersey Central but denying that the provisions of Section 203(a) were applicable to the transaction for the asserted reason that Jersey Central was not a public utility within the meaning of the Act. Jersey Central sought intervention, was made a party to the proceedings, and asserted the same defense. After hearing, the Commission found that Jersey Central was a public utility within the meaning of the Act and that Jersey Power had acquired the securities in violation of Section 203(a). The Commis- [fol. 1121] sion issued its findings on July 18, 1939. Petitions for rehearing timely filed by both Jersey Central and Jersey Power were denied by the Commission on September 15, 1939. Review of the Commission's determination was then sought in this court.

Both Jersey Central and Jersey Power own and operate public utility systems in New Jersey. The petitioners and another electric public utility corporation, Public Service Electric and Gas Company, serve territories which comprise about two-thirds of the area of the State of New Jersey. Jersey Power's territory lies in the Western part of the State and is bounded roughly upon the west by the line of the Delaware River and the western boundary of New Jersey. To the south Jersey Power's territory

moves down with the line of the river to territory contiguous with that served by the Philadelphia Electric Company and its subsidiaries in Pennsylvania.

Jersey Central for its part serves two non-contiguous areas in New Jersey. One lies to the north adjacent to and east of the territory of Jersey Power and contiguous to the area served by Public Service on the east. Jersey Central has another area of service to the south and east of the territory of Public Service just mentioned. The latter area of Jersey Central runs from the Atlantic coast back to and contiguous with territory served by Public Service. It is with this area of service of Jersey Central with which we are most concerned in the cases at bar. Beginning at a point near Barnegat on the Atlantic coast, Jersey Central's lines run north through the New Jersey seaside resorts to South Amboy. Further to the west in central New Jersey other lines of Jersey Central supply electricity to New Lisbon and villages and towns to the north of it. These western lines connect with the eastern system at South Amboy.

From South Amboy a main connecting line runs across the territory of Public Service into the northern area served by Jersey Central. There is a large generating plant at South Amboy which is connected with a substation main-[fol. 1122] tained by Public Service at Perth Amboy on the opposite side of the Raritan River. This substation is known as the Mechanic Street Substation and what goes on there furnishes many of the basic facts giving rise to the controversy at bar.

The line which connects Jersey Central's generating plant at South Amboy with the Mechanic Street Substation is a little over two miles long. Jersey Central owns about seven-eighths of a mile of the connecting line, that portion of it which runs from Jersey Central's generating plant to the south bank of the Raritan River. At that point a submarine cable, owned by Public Service, takes the current under the Raritan River. Emerging from the river the current is taken by an overhead line owned by Public Service for a distance of about a mile and a fifth to the Mechanic Street Substation owned by Public Service. The connecting line comes into the Mechanic Street Substation through metering equipment and switches and is connected with a "bus-bar". There are a number of connections to

the bus. Two are to the plant of the General Cable Corporation, a customer of Public Service. Two are connections with Metuchen, New Jersey. Another connection leads to the town of Keasby in that state. An additional connection runs to Public Service's substation at Carteret, New Jersey. There is also, and this is of particular importance, a tap with metering equipment and an air break switch connected to a line of Staten Island Edison Corporation which serves Staten Island, New York.

At this point it becomes necessary to endeavor to describe three "types" of electricity which flow through the Public Service bus-bar at the Mechanic Street Substation. These three "types" of power are designated as "emergency", "economy-flow" and "incidental" or "slop-over" power. The petitioners take the point of view that we are concerned particularly with the last two kinds of electrical energy. But the fact is that electricity is energy no matter what you call it and the "types" of electrical energy involved in the cases at bar, as the petitioners use that word, refer [fol. 1123] really to the kind of contractual relations between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other, pursuant to which current comes to or from Public Service's bus-bar at the Mechanic Street Substation.

"Emergency" power is simply electricity supplied by one power company to another when the latter needs additional electrical energy to take care of an emergency. The cost of emergency power is higher than that of the other types of power. The cost of and conditions for supplying emergency power between Public Service and Jersey Central are governed by a contract executed by the two companies and dated March 24, 1931.

The contract of March 24, 1931 provides that if the interconnecting facilities of the two companies are made available for power other than emergency power, the use of the connections should be made available by agreement between the companies. Accordingly Jersey Central and Public Service arrived at an oral agreement for an interchange of "economy-flow" electricity. Economy-flow electricity may be described as energy generated and supplied by one company to another when the receiving company has enough generating facilities to generate that electricity for itself but elects to receive it from another company because that company can generate and deliver it to the point where it is

needed more cheaply than the purchasing corporation. Economy-flow power is supplied to Public Service by Jersey Central upon a day-to-day basis and the price is calculated by a formula which consists in taking half of the cost of the electricity to the generating company and adding to that figure half of what the cost would have been if the purchasing company had generated the electricity.

Public Service receives economy-flow current almost daily from Jersey Central but it should be noted that Jersey Central's net receipts from the sale of economy-flow current for the year 1937 were about $10,000 while its net income from all the electricity sold by it during the same period [fol. 1124] amounted to $4,170,585. Jersey Central in fact is principally engaged in the retail sale of electricity to numerous individual customers in its territory. We shall deal with the electricity supplied by Jersey Central to Public Service in terms of kilowatt-hours at a later point in this opinion.

We think that "slop-over" or "incidental" current is well described upon the brief of the petitioner, Jersey Power, as " * * * an electrical phenomenon which consists in an instantaneous, involuntary ebb and flow where there is a physical connection, otherwise unused, between two systems. Where such an unused connection exists the two systems are normally 'in balance.' When there is a sudden demand for more energy made on one of the systems, its generators are speeded up to meet the demand. There is a tendency, however, for the system on which the sudden demand is made, to draw on the system with which it is connected for the instantaneous period between the demand and the compensating generating speed-up. * * * " Since the systems of Jersey Central, Jersey Power and Public Service are interconnected and are synchronized,[1]

[1] Synchronization consists in running the generators upon interconnected systems at the same rate of speed. One or more generators at strategic points upon the connected systems set the pace like metronomes running in unison. It appears from the record in the cases at bar that the metronome generators which set the pace for the interconnected alternating current power systems which we are discussing are operated on the systems of other interconnected public utility systems in Pennsylvania and New York. The Staten Island Company is in turn a part of and connected with

not only with each other but also with other electrical transmission systems covering the southern part of New Jersey, the southeastern part of Pennsylvania, the northeastern part of Maryland, Delaware and with the Staten Island Company, "spinning" reserve is maintained by Jersey Central, Jersey Power and Public Service. Additional spinning reserve is procurable from interconnected public utilities in Pennsylvania and New York. Spinning reserve [fol. 1125] consists of spinning dynamos, whose current may be thrown on the circuits in case of necessity. Since these various electric utilities systems are interconnected, it is obvious that there will be some incidental or slop-over current passing through the various system connections including the bus-bar at the Mechanic Street Substation which comprise the connections between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other.

According to an exhibit introduced in evidence by the Commission the amount of economy-flow current received by Public Service from Jersey Central in 1937 and in the first three months of 1938 far exceeded the current in that category gotten by Jersey Central from Public Service. This power was metered at South Amboy and passed through the bus-bar of the Mechanic Street substation. In 1937, 55,421,000 KWH of electricity were delivered by Jersey Central to Public Service against 315,600 KWH received by Jersey Central from Public Service. For the first three months of 1938 Jersey Central delivered to Public Service 10,140,000 KWH against 87,400 KWH received by Jersey Central from Public Service. In 1936 Public Service received from Jersey Central 70,694,825 KWH against 1,400,720 KWH delivered by Public Service to Jersey Central. In 1935 the KWH delivered by the two companies to each other were comparable to the amounts delivered in 1936 and in 1934 the figures were comparable to those of 1937.

The meters at the Mechanic Street Substation were read at half hour intervals from 6 A. M. until midnight and at

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one of these systems. Though much emphasis is laid by some of the Commission's witnesses on the phenomenon of synchronization, it does not possess significance under the facts of the appeals at bar except to the extent indicated in the opinion.

hour intervals from midnight to 6 A. M. These readings were recorded regularly on log sheets kept by the station employees. From January 1, 1937 to September 6, 1938, 25,500 readings were made and recorded in the log. 184 readings, which the Commission found representative, were selected from the 25,500 readings and analyzed further by the Commission's experts. These show that as electricity flowed from Jersey Central to the Mechanic Street Substation, current flowed out from the bus-bar to [fol. 1126] the Staten Island Company. The 184 readings demonstrated that the electricity transmitted by Jersey Central to Public Service exceeded the local requirements for electricity from the bus-bar. 24 of the 184 readings were subjected to further analyses by the Commission in an attempt to determine the percentage of electricity supplied to the Staten Island Company originating in the Jersey Central system. The Commission found that these readings demonstrated that electricity was flowing out of all of the bus-bar connections except the connection with Jersey Central where current was flowing in. As a consequence the Commission found there was no electricity coming in to the bus-bar on these occasions except from Jersey Central. As to five periods examined it appeared that the flow of electricity to Public Service on the bus-bar from Jersey Central exceeded the requirements of the Central Division of Public Service, the load required to maintain the Staten Island Company and all local requirements of the substation.

The petitioners take exception to the conclusions drawn from the readings by the Commission's experts. They say that you can't earmark a kilowatt. This saying is as true as a statement that running water cannot be earmarked. But if water is put into a reservoir which is connected with pipes which cross state lines, some of the water will cross state lines and enter into interstate commerce if it be the subject of commercial transactions. The analogy between water and electricity is illustrative of the facts in the case at bar. The Commission was justified in finding as a fact that some of the electricity generated by Jersey Central at its South Amboy plant reached Staten Island.

Operators of the Staten Island Company stationed at the Staten Island end of the submarine cable running from the bus-bar under the Arthur Kill and operators of Public

Service on the New Jersey side of that estuary watched meters which registered the flow of current passing between the two companies and could and did cut the flow of electricity between them from time to time. The petitioners [fol. 1127] contend that much of the electricity which passed through the connection was slop-over or incidental current, that such flow was accidental and unintentional and should be disregarded as not in fact constituting interstate commerce. But on at least six occasions between August, 1935 and March, 1938 emergency current was metered through the cable from Public Service to Staten Island. Economy-flow current passed with some frequency between Public Service and the Staten Island Company. Between August 26, 1935 and December 31, 1935 the Staten Island Company got economy-flow current from Public Service at least ten times and received approximately 51,800 KWH from such flow. In 1936 the Staten Island Company received economy-flow current from Public Service thirty-seven times and got over 329,600 KWH therefrom. As an exhibit introduced by Jersey Power before the Commission shows, from the end of August, 1935 until the middle of March, 1938, leaving incidental flow out of the calculation but including emergency current therein, the Staten Island Company received 403,125 KWH from Public Service for which it paid over $3,300.

The amount of incidental flow current between Public Service and the Staten Island Company from the end of August, 1935 to the middle of March, 1938 is shown by another exhibit introduced into evidence by Jersey Power. It appears that from August 26 to December 31, 1935 the Staten Island Company delivered to Public Service 1,125,000 KWH of electrical energy and received from Public Service in the same period 1,013,900 KWH, leaving an excess of deliveries from Staten Island to Public Service of 111,100 KWH. Transmission figures of KWH for 1936, 1937 and 1938 are comparable and show that throughout the period designated, the Staten Island Company delivered more incidental flow current to Public Service than it received from that company. But the emergency and economy-flow current which the Staten Island Company received from Public Service was much greater than the amount of incidental flow current which went from the Staten Island Company to Public Service. Subtracting the value of the incidental flow

[fol. 1128] current delivered by Staten Island to Public Service from the emergency and economy-flow current delivered by Public Service to Staten Island we arrive at the balance of 52,100 KWH in favor of the Staten Island Company for which that company paid Public Service over $2,400.

How much of the electricity which flowed from Public Service to the Staten Island Company originated in Jersey Central's South Amboy generators and passed over the connecting line from South Amboy to the Machanic Street Substation and thence through the bus-bar to the Staten Island Company no one can say. It is certain that some did go to the Staten Island Company. Measured in terms of the KWH generated and transmitted by large electric public utility systems it was small.

There are details of the picture which we have omitted but what we have said presents with reasonable accuracy the situation between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other.

The Commission bases its entire case upon the transmission of electricity by Jersey Central over the connecting line to Public Service and the fact that some part of this current reached the Staten Island Company.

THE LAW

Jurisdiction to Review the Determination by the Commission

A preliminary question must be disposed of. The petitioners assert that this court has jurisdiction to review the "Determination by the Commission" which found Jersey Central and Jersey Power to be public utilities within the meaning of Part II of the Federal Power Act. The Determination by the Commission was followed by its order denying petitions for rehearing. The denial of such petitions is a prerequisite to the review prescribed by the Act in courts of appeals. See Section 313 of the Act (16 U. S. C. A. Sec. [fol. 1129] 825 l) which provides that any party to a proceeding under the Act aggrieved by "an order" issued by the Commission may obtain a review of such order in a circuit court upon the denial of rehearing by the Commission. The question which we must determine is whether the "Determination by the Commission" has the status

of a reviewable order within the purview of Section 313(b) of the Act (16 U. S. C. A. Sec. 825 l (b)).

There can be no doubt that the effect of the Commission's determination is to establish Jersey Central's status as a public utility within the meaning of Section 201 of the Federal Power Act (16 U. S. C. A. Sec. 824). If the determination by the Commission that Jersey Central is a public utility stands, the sale of the stock of Jersey Central to Jersey Power became subject to the provisions of Section 203 (a) of the Act. But more than this, if the determination is affirmed, all the provisions of Parts II and III of the Act become applicable to Jersey Central. Some of the prohibitions and commands imposed by the statute upon a corporation with the status of a public utility within Section 201 of the Act are set out in the margin. These may be felt to be burdensome and onerous but Congress has determined them to be necessary for the regulation of electric public utilities engaged in interstate commerce.[2]

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[2] A public utility may not sell, lease or otherwise dispose of its facilities without the approval of the Commission, Section 203(a) (16 U. S. C. A. Sec. 824b(a)).

May not establish rates and charges without the approval of the Commission, Section 206(a) (16 U. S. C. A. Sec. 824(e)(a)):

May be required to render more efficient service by the Commission, Section 207 (16 U. S. C. A. Sec. 824f):

Must file upon the request of the Commission inventories, statement of original cost, and inform the Commission as to all additions, extensions and new construction, Section 208(b) (16 U. S. C. A. Sec. 824g(b)):

Must keep its accounts according to regulations prescribed by the Commission, Section 301(a) (16 U. S. C. A. Sec. 825(a)):

Must furnish to the Commission any information in respect to its accounts and records, maps, contracts and reports which the Commission may require, Section 301(b) (16 U. S. C. A. Sec. 825(b)):

Its rates of depreciation may be fixed by the Commission, Section 302 (16 U. S. C. A. Sec. 825a):

Must file annual and periodic special reports as required by the rules or orders of the Commission, Section 304 (16 U. S. C. A. Sec. 825c):

Must not have as directors any officer or director of a bank,

[fol. 1130] While the rules which we must follow in determining whether the Commission's determination may be reviewed by this court are not set out specifically in the decision of the Supreme Court in Rochester Telephone Corporation v. United States, 307 U. S. 125, none the less the case indicates what our conclusion should be. In the Rochester case the Supreme Court was dealing with an appeal under Section 238 of the Judicial Code as amended (23 U. S. C. A. Sec. 345) from a final decree by a district court of three judges under the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. A. Secs. 45, 47a) as extended by Section 402(a) of the Federal Communications Act (47 U. S. C. A. Sec. 402(a)), dismissing on the merits a bill to review an order of the Federal Communications Commission.

The Federal Communications Commission had ruled that the Rochester Telephone Corporation owed obedience to certain orders issued by the Commission. Those orders required all telephone carriers subject to the Federal Com- [fol. 1131] munications Act to file schedules of their charges, copies of their contracts with other telephone carriers and other information. The Rochester Telephone Company not responding to the orders, a Division of the Commission

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trust company, banking association, or firm authorized to underwrite securities of a public utility or an officer or director of an electrical equipment company supplying electrical equipment to such public utility, Section 305(b) (16 U. S. C. A. Sec. 825d(b)):

Must pay penalties fixed by the Commission not to exceed $1,000 for wilful failure to comply with any order or to respond to any subpoena, issued under the Act, Section 315 (16 U. S. C. A. Sec. 825n):

For any wilful or knowing act of commission or omission in violation of any of the terms of the Act any person may be punished by a fine not exceeding $5000 or imprisonment for not more than two years or both, Section 316(a) (16 U. S. C. A. Sec. 825o(a)):

And for any wilful or knowing violation of any rule, regulation, condition or order made by the Commission any person may be punished by a fine not exceeding $500 per day for each and every day during which the offense occurs, Section 316(a) and (b) (16 U. S. C. A. Sec. 825o(a) and (b)).

ordered the company to show cause why it should not be required to file responses to the orders served upon it. The Rochester Telephone Company answered and took the position that it was outside the requirements of the Federal Communications Act in the matters concerning which the Commission attempted to impose its jurisdiction. The Commission determined that the Rochester Telephone Corporation was under the "control" of the New York Telephone Company and therefore was not entitled to the classification of a mere connecting carrier under Section 2(b) (2) of the Act (47 U. S. C. A. Sec. 152(b) (2)). The Rochester Telephone Company filed a bill in the District Court seeking to have the orders of the Commission set aside and annulled. The District Court held that that company did not come within the exception set forth in Section 2(b) (2) of the Act and it appealed.

The Supreme Court by Mr. Justice Frankfurter discussed the procedural problems involved in appeals from "negative" orders or orders *vel non*, dividing, pp. 129, 132, the prior decisions involving "negative" orders into three categories. We are interested in the second of these categories because the orders therein bear an analogy to the "Determination by the Commission" at bar. That second category is: Where the action of the Commission sought to be reviewed declines to relieve the complainant from the command of a statute forbidding or compelling conduct on his part. As an example Mr. Justice Frankfurter cites, "* * * A denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause." The second group "* * * is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant."

[fol. 1132] The complainant may rid himself of these restrictions by asking the Commission to place him outside of the statute or, if within the terms of the statute, he may invoke the dispensing power of the regulatory body. In the latter situation the complainant, seeking a judicial review to rid himself of adverse action by the Commission, must clear the three hurdles of the existence of a case or controversy under Article III of the Constitution, "the conventional requisites of equity jurisdiction; [and] the specific terms of the statute granting to the district courts jurisdiction in suits challenging 'any order' of the Commission." If he can clear these hurdles he reaches his goal, the

jurisdiction in the reviewing court, to hear his appeal. In the case at bar the three hurdles have been removed by the specific review provisions of Section 313(b) of the Federal Power Act. The "Determination by the Commission" at bar is analogous to the orders in the second group described by Mr. Justice Frankfurter, orders imposing statutory obligations and prohibitions and it should follow that this court has jurisdiction to review the action of the Federal Power Commission which makes Jersey Central subject not only to statutory regulations which interfere with its freedom of conduct but compel specific actions by the Company and prohibit other actions by it.

In the case of Federal Power Commission v. Pacific Co., 307 U. S. 156, the question was presented as to whether an order of the Commission denying an application under Section 203(a) of the Act, the very section which the Commission invoked in the case at bar, was reviewable under Section 313(b). The facts were as follows. Two operating power companies filed a joint application under Sections 8 and 203 of the Act (16 U. S. C. A. Secs. 801 and 824b(a)), proposing to transfer all of the assets including licenses from one company to the other, terminating the existence of the first company. The Federal Power Commission found that the applicants had failed to establish that the proposed transfer would "* * * be consistent with the public interest within the contemplation of Section 203(a) [fol. 1133] of the Federal Power Act * * *" and denied the application. The power companies sought a review of the Board's order before the Circuit Court of Appeals for the Ninth Circuit and the Commission challenged the jurisdiction of that court by a motion to dismiss the petition on the ground that the court was without jurisdiction under Section 313(b) because the order of which review was sought was a negative order.

The Supreme Court, ruling that the order complained of was reviewable, p. 159, stated that if the Federal Power Act had included the provisions of the Urgent Deficiencies Act pertaining to reviews of orders of the Interstate Commerce Commission, the decision of the Supreme Court in the Rochester Telephone Corporation case would sustain the assumption of jurisdiction by the circuit court of appeals. Mr. Justice Frankfurter said, "But the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the

scope of jurisdiction of the lower federal courts." Referring to Section 313(b), the Supreme Court concluded that the denial of the power companies' application by the Commission as not consistent wtih the public interest, was an order; that the petitioners were aggrieved by it since without such approval the transfer was forbidden. "Thus," said the Supreme Court, "the statutory scheme of the Power Act only reinforced the analysis made in the Rochester case."

The determination by the Commission that the acquisition of stock of Jersey Central by Jersey Power was in violation of Section 203(a) of the Act is paralleled by the order of the Commission denying the application of the power companies in the Pacific Power & Light Co. case. In the instant case the Commission viewed what had been done in retrospect and in effect forbade it. In the Pacific Power & Light Co. case the Commission viewed what was contemplated and ordered the power companies not to carry out the transfer of assets. In the instant case the Commission found Jersey Central to be a public utility within the meaning of Section [fol. 1134] 201 and thereby imposed upon Jersey Central the burden of complying with the provisions of the Act.

We conclude therefore that we have jurisdiction to review the Determination by the Commission. Compare Canadian River Gas Co. v. Federal Power Commission, 110 F. (2nd) 350, 113 F. (2nd) 1010, cert. den. 311 U. S. 693.

Is Jersey Central a Public Utility Within the Meaning of Section 201 of the Act?

Section 201(e) of the Federal Power Act (16 U. S. C. A. Sec. 824(e)) defines the term "public utility" when used in Parts II and III as "• • • any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part." To determine whether Jersey Central is a public utility within Section 201(e), it is necessary to determine the meaning of the word "facilities" as used in that subsection; that is to say, it is necessary to determine the existence or non-existence of "facilities" subject to the jurisdiction of the Commission. Section 201(b) (16 U. S. C. A. Sec. 824(b)) provides that the provisions of Part II shall apply to the transmission or sale at wholesale of electricity in interstate commerce "• • • but shall not apply to any other sale of electric energy • • •". The subsection then goes on to provide that the

Commission shall have jurisdiction "* * * over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce * * *". Section 201(c) (16 U. S. C. A. Sec. 824(c)) provides that for the purpose of Part II, "* * * electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof; * * *".

The Commission takes the position that Jersey Central owns and operates "facilities" subject to its jurisdiction [fol. 1135] because Jersey Central transmits electricity from its South Amboy generating plant through the line owned by it, seven-eighths of a mile long, which connects at the south bank of the Raritan River with the line of Public Service which runs into the Mechanic Street Substation and is attached to the bus-bar which distributes current to the Staten Island Company. Therefore, say the Commission, Jersey Central is a public utility within the meaning of Section 201(e).

The petitioners lay emphasis on the provisions of Section 201(a) (16 U. S. C. A. 824(a)) which contains the declaration of policy embraced by Congress in passing the Federal Power Act. That Section provides: "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest; and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." Jersey Central takes the position that all phases of the conduct of its business properly are subject to regulation by the State of New Jersey and that the New Jersey statute regulating Public Utilities (R. S. 1937, 48:2-13) is entirely sufficient to control and regulate Jersey Central. That company lays particular emphasis on Section 204(f) (16 U. S. C. A. 824c (f)) which provides that "The provi-

sions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State Commission."

Jersey Central points out that the Commission finds that because the electricity which moves between the Staten Island Company and Public Service is in interstate commerce, the facilities of Jersey Central which conduct that electricity to Public Service are in interstate commerce, [fol. 1136] though wholly within the State of New Jersey and functioning solely by reason of a contract between Jersey Central and Public Service for the delivery of electricity from the former company to the latter within the State of New Jersey. This conclusion, says Jersey Central, "* * * is based solely on insignificant and relatively infrequent but wholly uncontrolled occasions when energy of Jersey Central is found in the Staten Island facilities." Both petitioners contend that the Federal Power Act was not intended to include within the jurisdiction of the Commission such a facility as Jersey Central's short line and state that it is an absurdity to bring within federal jurisdiction a generating company whose electricity happens to flow across a state border into the system of a neighboring company. It is, of course, beyond dispute that Jersey Central itself sells no electricity directly in interstate commerce. So far as this record shows, aside from its own local customers, Jersey Central sells electricity only to Public Service and delivers that electricity to Public Service wholly within the State of New Jersey. The jurisdiction of the Commission must rest upon Jersey Central's ownership and operation of facilities for transmission of electricity which flows under the Arthur Kill from New Jersey to Staten Island.

The petitioner, Jersey Power, lays emphasis also upon the legislative history of Parts II and III of the Act. It points out that the first bill introduced on the subject, S 1725, 74th Cong., 1st Sess., February 6, 1935, provided by Section 201(a) that the provisions of the title should apply to the transmission and sale of electric energy in interstate commerce, to the production of energy for such transmission and sale, and that the Commission should have jurisdiction over "all facilities for such transmission, sale and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one state * * * ". Hon Clyde

Nos. 299 and 329.

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

No. 299.

JERSEY CENTRAL POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 329.

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF FOR PETITIONERS.

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L. Seavey, Chairman of the House Committee on Interstate and Foreign Commerce, stated in respect to the House bill, "The new Title II of this Act is designed to secure [fol. 1137] coordination on a regional scale of the nation's power resources and to fill the gap in the present state regulation of electric utilities. It is conceived entirely as a supplement to, and not as a substitution for State Regulation." See Hearings on H. R. 5423 before the House of Representatives Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. Part I, p. 384. As Jersey Power states, there was opposition to this bill and to the corresponding bill introduced in the Senate. The opposition took the position that proposed legislation should be confined to matters beyond the power of state regulatory agencies. See Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess., H. R. 5423, Part 3, p. 1623 ff. Thereafter the Senate Committee in charge of the legislation in that body reported out a new bill, S. 2796, Sections 201(a) and (b) of which were comparable to Section 201(a) of S. 1725. These new sections declared the business "* * * of generating, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest", and declared also that federal regulation of the transmission and sale of electric energy in interstate commerce "and [of] the generation of electric energy for such transmission and sale * * *" was necessary in the public interest. Subsection (a) of the new Senate bill further stated that it was the policy of Congress to extend federal regulation to those matters which could not be regulated by the states and to assist the states in the exercise of their regulatory powers without impairing or diminishing the authority of any state commission. Section 201(b) of S. 2796 provided that the provisions of Part II should be applied to the transmission of electric energy, to its sale at wholesale in interstate commerce, and, "to the production of electric energy for such transmission or sale." It stated that the Commission should have jurisdiction over all facilities "for such production, transmission or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one state, except facilities used only for the production or [fol. 1138] transmission of electric energy in intra state commerce or in local distribution * * *".

It is to be noted that in S. 2796 there were inserted for the first time provisions protecting the regulatory powers of the states. Generating facilities employed for the creation of electricity to be used in interstate commerce remained subject to the Commission's jurisdiction as did all facilities connected with such generating facilities as parts of interstate transmission systems.

In the report of the Committee on Interstate Commerce submitted to the Senate by Senator Wheeler (See S. Rep. No. 621, 74th Cong., 1st Sess. pp. 17, 18 and 19) it is stated: "The new part 2 of the Federal Water Power Act would constitute the first assertion of Federal jurisdiction over this major interstate public utility. The decision of the Supreme Court in Public Utilities Commission v. Attleboro Steam & E. Co. (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically.

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"* * * The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters * * *"

Thereafter in the House of Representatives alterations were insisted upon and Sections 201(a) and (b) of the Act were set forth substantially in their present form. It will be noted that in the House amendments jurisdiction of the Commission over generating facilities and "facilities connected therewith as parts of a system of power transmission situated in more than one state" were not expressly included. [fol. 1139] The report accompanying the bill in the House (74th Cong., 1st Sess. House Report No. 1318) offered by Representative Rayburn, states, pp. 7 and 8: "The new parts are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. The percentage of electric energy generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933. The amount of energy transmitted in interstate commerce in

1933 was greater than all of the energy generated in the country in 1913. Under the decision of the Supreme Court of the United States in Public Utilities Commission v. Attleboro Steam & E. Co. (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States.

* * * * * * * * *

"The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

The statement of the House Conferees accompanying the Conference Report upon S. 2796 offered by Representative Rayburn, Chairman of the House Conferees, (74th Cong., 1st Sess., House Report No. 1903, p. 74) says, "The Senate bill in section 201(a) contained a somewhat more lengthy declaration of policy than the House amendment, the only material difference being that the House amendment contained no reference to 'generation' of electric energy which appeared in the Senate bill. The conference substitute follows the language of the House amend- [fol. 1140] ment but inserts a clause relating to generation to the extent regulation thereof is provided for in this part and the part next following. The House amendment and conference substitute also makes reference to the 'sale of electric energy at wholesale in interstate commerce' which reference did not appear in the Senate bill. The same general differences between the Senate bill and the House amendment also appear in section 201(b) and the language of the House amendment has been followed with a clarifying phrase added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation and local distribution of electric energy to the extent provided in other sections of this part and the part next following."

As we have said Section 201(a) of the Act states ex-

plicitly that the federal regulation proposed by the Act is intended "to extend only to those matters which are not subject to regulation by the states", and that Section 201(b) says with equal clarity that the Commission "shall not have jurisdiction, * * * over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of such electric energy in intrastate commerce, * * *." Generation of electricity, its local distribution or its transmission in intrastate commerce are not within the purview of the Act or the jurisdiction of the Commission. But the contentions of the petitioners in respect to the effect of the legislative history of Part II lose much of their potency when we contemplate the provisions of Section 201(c) which state that electricity shall be held to be transmitted in interstate commerce if transmitted from a state and consumed outside that state. Section 201(c) of the Act was in the original bill submitted to the Senate and the House of Representatives and came into the law substantially without change. That section fits well into the law as laid down by the decision of the Supreme Court in Public Utilities Comm. v. Attleboro Steam and Electric Co., 273 U. S. 83, and takes away, we think, the force of the argument of unconstitutionality made on behalf of the petitioners, at least insofar as the application of Section 201 of the Act to Jersey Central [fol. 1141] is concerned. The provisions of Part II were intended by Congress to be applied only to electrical energy transmitted in interstate commerce and in this field there can be no doubt that Congress possesses the constitutional right to legislate. See Northern Securities Company v. United States, 193 U. S. 197.

It follows that what we are concerned with in the appeals at bar is ascertaining the intention of Congress. We think that Congress intended to impose regulation upon those public utilities which operate facilities for the transmission of electricity in interstate commerce, transmission in interstate commerce being defined as electricity transmitted from a state and consumed at any point outside its borders.

An objection raised by the petitioners to the jurisdiction of the Commission lies in the small quantities of electricity which pass from Jersey Central's generating plant at South Amboy through the Public Service bus-bar into the lines of the Staten Island Company and the fact that this

electricity was not paid for by any consideration passing from the Staten Island Company to Jersey Central. There were no commercial transactions whatsoever between the Staten Island Company and Jersey Central. Jersey Power takes the position that insofar as economy-flow current passed between Jersey Central and Public Service on the one hand and Public Service and Staten Island on the other, the respective arrangements for this current had no relation to or effect upon the non-participating company and that Jersey Central supplied only such current as Public Service otherwise would generate for its own use.

Some part of the electricity passing from the Jersey Central system to the Public Service system moved in interstate commerce and reached the Staten Island Company. That electric energy was transmitted in interstate commerce within the meaning of Section 201(c) if the words of the subsection be applied literally. The facilities of Jersey Central were in fact employed for this transmission. This was not an accident. Once the circuit between the Jersey Central generating plant and the Staten Island Company [fol. 1142] was closed, inevitably electricity flowed from Jersey Central to the Staten Island Company. That result was not only not unexpected, it was unavoidable. The fact that Jersey Central sold this electricity to Public Service rather than to Staten Island does not serve to put the flow out of commerce. Once electricity flowed from the Jersey Central generating plant to the Staten Island Company, commercial transactions between the three companies under their respective contractual relations and arrangements followed. This was interstate commerce within the meaning of the Commerce Clause. For an analogy see the decisions of the Supreme Court in Eureka Pipe Line Company v. Hallanan, 257 U. S. 265, and United Fuel Gas Co. v. Hallanan, 257 U. S. 277. We do not think that it is important that the electricity which was transmitted is designated as emergency, economy-flow, incidental or slop-over current. It is electricity which is transmitted from New Jersey to New York when circuits are closed. We conclude, therefore, that the transmission of current which reached the Staten Island Company by Jersey Central over its facilities was such transmission as is described in the second sentence of Section 201(b). It follows that Jersey

Central is a public utility within the meaning of Section 201(e) of the Act.

As we have indicated it was the intention of Congress in passing Part II of the Act to extend federal regulation to the transmission of electricity in interstate commerce. But by Section 201(a) Congress made it plain that such regulation was to extend only to those matters which were not subject to regulation by the states. The petitioners point out that the transfer of stock with which we are concerned was approved by the Board of Public Utility Commissioners of New Jersey in the exercise of the authority granted to the Commissioners by the law of New Jersey, R. S. 1937, 48:2-13.

The sale of the Jersey Central stock to Jersey Power properly was subject to regulation by the State of New Jersey because Jersey Central was engaged in intrastate commerce in that it supplied electricity to local consumers [fol. 1143] within the State of New Jersey. The sale was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of Section 201(e). We must consider the point of dual control but only insofar as it may be applicable to the appeals at bar, in view of the provisions of Section 201(a) restricting federal regulation, and the legislative history of Part II of the Act. The authority of the Board of Public Utility Commissioners of New Jersey must be deemed to be paramount in those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the transmission of electric energy in interstate commerce. We cannot presume a conflict between the two regulatory bodies upon the issue of whether or not Jersey Power should have bought the stock of Jersey Central. No conflict is shown upon the present record and none may ever come into existence.

The determination of the Commission is affirmed.

Appendix B

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

7411-13-15 New Post Office Building
Washington, D. C.

BULLETIN No. 102—1942 June 5, 1942

TO MEMBER COMMISSIONS:

The U. S. Circuit Court of Appeals for the Third Circuit has sustained the order of the Federal Power Commission in the *Jersey Central Power and Light Company* case, referred to in our Bulletin No. 99—1939. The decision is somewhat startling, in that, if sustained, it would seem to show that any *intrastate* electric utility which transmits *any* power to another electric utility runs the risk of being transformed into *an interstate utility*, subject to the Federal Power Act, by *transactions over which it has no control*. The facts were these. The Jersey Central plant is in New Jersey and it sells energy only in that state. It, however, has arrangements with the Public Service Electric and Gas Company, under which it occasionally exchanges energy. The Public Service company's principal transactions are intrastate, but it has an exchange arrangement with the Staten Island Edison Corporation in New York, similar to its arrangement with Jersey Central. From August 1935 to March 1938 the Staten Island Company received 52,100 KWH more energy than it delivered to Public Service, and paid therefor some $2400. This trifling sum may be compared with revenues of the Jersey Central from electric sales of over $4,000,000. It will be perceived that *Jersey Central has no transactions with the Staten Island company.* No power generated by Jersey Central could reach Staten Island unless by an exchange delivery by Jersey Central to Public Service at the very instant Public Service happened to be delivering to Staten Island. If any such energy ever is thus delivered to Staten Island it is insignificant. *This is what the court said on that point,* in its opinion:

"How much of the electricity which flowed from Public Service to the Staten Island Company originated in Jersey

Central's South Amboy generators * * * *no one can say.* It is certain that some did go to the Staten Island Company. Measured in terms of the KWH generated and transmitted by large electric public utility systems *it was small.*"

Another electric utility acquired stock in the Jersey Central, *with* the approval of the New Jersey Commission, but *without seeking authority from the Federal Power Commission.* In a proceeding wherein the validity of the acquisition was brought in question, the purchasing utility denied that the Jersey Central was a public utility, as defined in Section 201(e). The Commission held the Jersey Central to be a public utility. That decision the court now sustains. *In its report* the Commission based its ruling *solely* upon the fact that the power exchange transactions between Jersey Central and Public Service are effected over a connecting line 7/8 of a mile of which is owned by the Jersey Central. This is held to be a "facility" used *in the transmission of electric energy* moving in interstate commerce. *Ergo*, the Federal Power Commission has jurisdiction over Jersey Central, and jurisdiction over the stock purchase transaction in question. The court, reviewing the Commission's order, said:

"The Commission bases its entire case *upon the transmission of electricity* by Jersey Central *over the connecting line* to Public Service and the fact that *some part of this current* reached the Staten Island Company. * * * That electric energy *was* transmitted in interstate commerce within the meaning of Section 201(e) *if the words of the subsection be applied literally.* The facilities of Jersey Central were in fact employed for this transmission. * * * The fact that Jersey Central sold this electricity *to Public Service rather than to Staten Island* does not serve to put the flow out of commerce. Once electricity flowed from the Jersey Central generating plant to the Staten Island Company, commercial transactions between the three companies under their respective contractual relations and arrangements followed. This was interstate commerce within the meaning of the Commerce Clause. *It follows that Jersey Central is a public utility within the meaning of Section 201(e) of the Act.*"

The court reviews at length committee reports declaring Congressional intent not to diminish State power, and seem-

ingly holds that this intent applies to the stock sale transaction involved; but *the court backs away from the question as to what happens if State and Federal commissions disagree.* We quote from the opinion on this point:

"As we have indicated * * * by Section 201(a) Congress *made it plain that such regulation was to extend only to those matters which were not subject* to regulation by the states. The petitioners point out that the transfer of stock with which we are concerned was approved by the Board of Public Utility Commissioners of New Jersey * * *. *The sale of the Jersey Central stock* to Jersey Power *properly was subject to regulation by the State* of New Jersey because Jersey Central was engaged in intrastate commerce * * *. The sale was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of Section 201(c). We must consider the point of dual control but only insofar as it may be applicable to the appeals at bar, in view of the provisions of Section 201(a) restricting federal regulation, and the legislative history of Part II of the Act. *The authority of the Board of Public Utility Commissioners of New Jersey must be deemed to be paramount* in those matters which may affect the intrastate transmission of electricity and the *authority of the Federal Power Commission must be deemed to be governing* as to those matters which may affect the transmission of electric energy in interstate commerce. 'We cannot presume a conflict between the two regulatory bodies upon the issue of whether or not Jersey Power should have bought the stock of Jersey Central. No conflict is shown upon the present record and none may ever come into existence.''

While the court declared that its concern was to *ascertain the intention of Congress*, it felt that it was doing so by applying to the words of Section 201(b) *their literal meaning.* In a recent case (310 U. S. 534) the U. S. Supreme Court said:

"*To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute*, particularly in a law drawn to meet many needs of a major occupation. There is, of course, no more persuasive evidence of the purpose

of a statute than the words by which the legislature undertook to give expression to its wishes. * * * *When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.*" (All italics in quotations herein supplied.)

That the transmission of electric energy in these exchange transactions between two New Jersey Utilities constituted *the character of transmission* which Congress declared to be necessary to be regulated by the Federal Government, it is difficult to believe. The fact that such transmission may be said to fall within the language of Section 201(c) "applied literally" seems of doubtful consequence in the face of the provision of Section 201(a) that the Federal regulation shall extend "only to those matters which are not subject to regulation by the states." *Plainly*, as the court in its opinion says, *the stock sale transaction was subject to State commission regulation.* If within the reach of Federal power to regulate, Congress chose to direct that the Act should be so construed as to avoid interference with the exercise of State power. In this case, however, the court appears to have held that the stock sale transaction is *subject to regulation both by the New Jersey Commission and by the Federal Power Commission.* How each such commission can exercise "paramount" or "governing" authority over the same transaction, it is difficult to understand. The fact that conflict between the two commissions has not yet arisen does not answer the question. If the construction placed upon the Act by the court brings the Jersey Central under the jurisdiction of the Federal Power Commission, as to that transaction, *either that commission has power to override the decision of the New Jersey Commission, or its decision is not "governing".*

JOHN E. BENTON,
General Solicitor.